IN THE

Supreme Court of the United States

October Term, 1946.

No. 402

WILLIAM HENRY LEDFORD,
WILLIAM RAMSEY BROCK,
W. B. LINT,
WILLIAM SAMPSON METCALF, - - - Petitioners,

versus

UNITED STATES OF AMERICA, - - - Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Sixth Circuit

AND

BRIEF IN SUPPORT THEREOF.

HARRY B. MILLER,
Lexington, Kentucky,

JAMES SAMPSON,
Harlan, Kentucky,
Counsel for Petitioners.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

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v.

UNITED STATES OF AMERICA, - - *Respondent.*

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Sixth Circuit (No. 10076).

Your petitioners pray that a writ of certiorari issue to review the final judgment of the United States Circuit Court of Appeals for the Sixth Circuit entered in the above case on July 15, 1946, affirming their convictions in the District Court for the Eastern District of Kentucky on July 18, 1945, and in support of their petition respectfully show:

SUMMARY STATEMENT OF MATTERS INVOLVED.

The petitioners, William Henry Ledford, William Ramsey Brock, W. B. Lint and William Sampson Metcalf, were convicted on July 18, 1945, in the District Court for the Eastern District of Kentucky for a violation of Section 19, Criminal Code (Section 5508, RS; Section 51, Title 18, USCA), providing:

> "If two or more persons conspire to injure, oppress, threaten or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States * * * they shall be fined not more than $5,000.00 and imprisoned not more than ten years * * *."

The petitioners herein denied all the averments of the indictment and were convicted solely upon incompetent testimony, in that the court permitted ballots, ballot boxes and other election paraphernalia to be introduced, which ruling of the court was contrary to the provisions of the laws of the United States, and petitioners were denied their constitutional rights under the laws of the United States.

After the verdict was returned these petitioners, and each of them, were sentenced to one year imprisonment and fined $100.00. After judgment had been pronounced these petitioners appealed from the District Court to the United States Circuit Court of Appeals for the Sixth Circuit, and on May 31, 1946, the Circuit Court of Appeals rendered an opinion affirming the District Court (R., pages 208-212).

Petition for rehearing was duly filed in the United States Circuit Court of Appeals and said petition was overruled, without opinion, on the 15th day of July, 1946 (R., page 214).

JURISDICTION.

1. The date of the judgment or decree to be reviewed is July 15, 1946, and this petition is filed within the time provided by law.

2. The statutory provision which is believed to sustain the jurisdiction of this court is Section 347, Title 28, of the United States Code.

SPECIFICATION OF ERRORS.

1. The United States Circuit Court of Appeals for the Sixth Circuit erred in holding that petitioners were guilty of a violation of Section 19 of the Criminal Code (Section 51, Title 18, USCA).

2. The opinion rendered by the Circuit Court of Appeals is based entirely upon the misconstruction, misapplication of and is in conflict with the cases of:

United States v. *Reed,* 53 U. S. 361,
United States v. *Thompson,* 251 U. S. 407,
Funk v. *United States,* 290 U. S. 371.

3. The Circuit Court of Appeals refused to recognize the rights of petitioners under Title 18, Section 631 C. C. A.

4. The Circuit Court of Appeals erred in overruling petitioners' contention that State statutes and

the usages which obtain in State courts will be followed in Federal courts unless they conflict with positive provisions of Federal statutes or the law prescribing the method of procedure in a given particular.

5. The Circuit Court of Appeals erred in applying Rule 26 of the New Rules of Criminal Procedure and in failing to apply the provisions of Rule 27 thereof, which is applicable in this case, with reference to official records and entries in criminal cases.

6. The Circuit Court of Appeals decided this case, as shown by the opinion, merely by adding inference to inference and in direct conflict with the dissenting opinion of Mr. Justice Douglas, concurred in by Mr. Justice Black and Mr. Justice Murphy, wherein it is stated:

> "Civil liberties are too dear to permit conviction for crimes which are only implied and which can be spelled out only by adding inference to inference." (United States v. Classic, 313 U. S. 299.)

7. The Circuit Court of Appeals has incorrectly analyzed the record as to the facts in the case.

8. The Circuit Court of Appeals inadvertently misquoted the testimony and based its opinion largely on this misquoted portion of the testimony.

9. The Circuit Court of Appeals erred in sustaining the lower court as to the competency of certain testimony.

REASONS FOR GRANTING WRIT OF CERTIORARI.

The Circuit Court of Appeals in its opinion accepted the law of Kentucky to be that before ballots, ballot boxes or any election paraphernalia can be introduced in evidence it must first be proven clearly and satisfactorily that the ballots, ballot boxes and other election paraphernalia have been kept as the statute requires and have not been tampered with since the election, and that before they can be offered in evidence it must be proven that they are in the same condition as when the boxes left the polls and that *there has been no opportunity to tamper with them.*

However, the Circuit Court of Appeals in its opinion further states:

> "But it should be bourne in mind that the rule announced in the Kentucky cases was declared and has been applied only in relation to election contests."

The record in this case shows conclusively that the ballots, ballot boxes and other paraphernalia had been tampered with between the time they left the polls and the time they were introduced in evidence. In spite of this, the Circuit Court of Appeals, in holding that such evidence was competent, relied upon the cases of

United States v. *Reed,* 53 U. S. 361,
United States v. *Thompson,* 251 U. S. 407,
Funk v. *United States,* 290 U. S. 371.

The Circuit Court of Appeals erroneously concluded that under authority of the cases above cited,

all of this election paraphernalia was competent evidence in a criminal case, and it is maintained that the court erred in such ruling for the following reasons:

The case of United States v. Thompson, *supra*, does not in any way involve the question as to the competency of testimony, and the only question therein involved was that an indictment was quashed and re-referred by the District Attorney without order of Court. This question was raised because, under the state law, it was necessary to obtain order of court before re-referring an indictment to the grand jury. The court ruled that, under the provisions of Section 722 RS, this rule of the State is not applicable in Federal courts. In short, the Thompson case was a question of procedure rather than the competency of testimony.

In the case of Funk v. United States, *supra*, the sole question was whether or not a wife, theretofore denied the right to testify for her husband, was a competent witness for him, and in that case no question was raised as to the competency of the testimony given by a competent witness.

In the case of United States v. Reed, *supra*, the District Court ruled that a conspirator was not a competent witness under the common law. However, this Honorable Court decided that a conspirator was a competent witness, but did not discuss or conclude that a competent witness could introduce incompetent testimony.

We readily agree that this Honorable Court has in various decisions held that the dead hand of the com-

mon law is not binding and that Federal courts may construe the common law to meet changing conditions. This court has further held that common law is not immutable but flexible, and while this Honorable Court has changed the rule to a certain extent as to what witnesses are competent, they have never changed the rule on the competency of testimony given by a competent witness.

With this in mind, we call to the attention of the court the fact that an inspection of the record will positively show that these petitioners were convicted solely upon the introduction of ballots and other election paraphernalia which had been tampered with between the time of the election and their introduction at the trial in court, and such admission is in direct conflict with the rules of evidence in the State of Kentucky which have been accepted as the rules of evidence in Federal courts.

We earnestly maintain that the provisions of the State statutes and the usages which obtain in State courts will be followed in the Federal courts where there is no conflict with positive provisions of Federal statutes or the law prescribing the method of procedure in a given particular. We believe we are justified in assuming this position under the authority of King v. Worthington, 194 U. S. 44, 26 L. Ed. 652. While the Worthington case, *supra,* is a civil case, we believe we are correct in assuming that the competency of testimony in civil suits is applicable in criminal prosecutions. Taking the Worthington case in consideration, we contend that the Circuit Court of Ap-

peals should have applied in this case the Worthington decision and the provisions of Title 18, Section 631, C. C. A., in which it is stated:

> "The competency of a witness to testify in any civil action, suit or proceeding in the courts of the United States shall be determined by laws of the State or Territory in which the court is held."

With this in mind, we maintain that the same rule governing the competency of evidence in civil cases applies in criminal cases, and we base this conclusion upon Rule 27 of the New Rules of Criminal Procedure in the United States Court, wherein it is provided:

> "An official record or an entry therein or the lack of such a record or entry may be proved in the same manner as in civil actions."

Applying, then, Rule 27 to the decision of this court in the Worthington case, *supra,* we contend that the competency of evidence in criminal cases is the same as in civil cases and that such rule should have been applied in this case.

We, therefore, maintain that if the ballots, ballot boxes and other paraphernalia cannot be introduced under the law of Kentucky, unless it is first proven that there was no opportunity to destroy their integrity, then the same rule of evidence should control in the trial of criminal cases in Federal court. We submit this proposition to the court in all sincerity, because the safeguards provided for defendants charged with crime should not in any event be less

than those given to persons contesting an election. If these safeguards as to the introduction of ballots, ballot boxes and other election paraphernalia are to be thrown around a contestant in an election contest, most certainly they should not be denied to persons charged with crime, whose liberty is at stake. In short, this Honorable Court has always ruled that a defendant charged with crime should have the safeguards provided by the Constitution and the laws of the United States thrown around him, and we do not believe that it can, under any circumstances, be contended that more protection should be given a litigant in a civil case than to a person whose liberty is at stake.

The Circuit Court of Appeals affirmed the District Court upon an erroneous reading of the record. It will be seen in the opinion of the Circuit Court of Appeals that it "infers" the guilt of the petitioners upon the ground that certain checks issued by the county treasurer of Harlan County were endorsed by various election officers who are petitioners herein. A reading of the record on pages 74 and 75 will disclose that at least two of the checks mentioned were not endorsed by two of the petitioners herein.

HARRY B. MILLER,
Lexington, Kentucky,

JAMES SAMPSON,
Harlan, Kentucky,
Counsel for Petitioners.

BRIEF

In Support for Petition for Certiorari.

OPINION BELOW.

The opinion of the Circuit Court of Appeals for the Sixth Circuit is to be found in the official transcript of record on pages 208-212.

JURISDICTIONAL GROUNDS.

Statement of grounds upon which the jurisdiction of this court is invoked is set out in the petition to which this brief is attached.

ARGUMENT.

With the firm belief that our petition for certiorari will be granted and that we will be given an opportunity to more fully brief this case, we will undertake to make this argument as short as possible.

A reading of the record will disclose that not a single witness was introduced by the Government to prove that any of the petitioners even served at the election charged in the indictment, or that they ever wrote a ballot or deposited one in the ballot box. It could have been very easy, if these petitioners were guilty, for the Government to have introduced legal voters who appeared at the pools and proven by them, if possible, that the petitioners actually served at the election in question. Not a single witness was introduced in the District Court by the Government to

prove that any of the petitioners were at or about the polls on election day. In spite of this, the Circuit Court of Appeals in its opinion states:

> "Metcalf, election judge, and the other three appellants endorsed warrants issued by the County Court Clerk and drawn on the Treasurer of Harlan County, Kentucky, for their services as such. It is logical to *infer* that they actually served as such."

Here again, we find the Circuit Court of Appeals affirming a conviction on *inference*. However, we call the court's attention to pages 74 and 75 of the transcript to show that the court is in error, and call this court's attention to these pages and to the testimony of H. H. Howard, as follows:

> "3. Do you have the county warrants in your possession, any of them now?
>
> A. Yes, sir.
>
> COUNSEL: Will you present them please? Do you have county warrant No. 5229 payable to Henry Ledford?
>
> DEPONENT: 5229?
>
> COUNSEL: Yes.
>
> A. Yes, sir.
>
> 4. What is it for? Will you read it?
>
> A. Well, it don't say. It was issued on November 7, 1942.
>
> 5. For how much?
>
> A. $3.96.
>
> 6. Do you know what that was for?
>
> A. No, sir, I don't. I presume—

7. It doesn't show what it is for, is that right?

A. No, sir; it doesn't state on the warrant what it is for.

8. But dated November 7, 1942?

A. Yes, sir.

9. *Is it endorsed?*

A. *Yes, sir, Henry Ledford by E. Kelly.*

21. Do you have another warrant No. 5232 to Ramsey Brock?

A. Yes, sir.

22. What is it for?

A. $3.96.

23. *Is it endorsed?*

A. *It is.*

24. *By whom?*

A. *Ramsey Brock by E. Kelly.*"

It may, therefore, be seen that the opinion of the Circuit Court of Appeals not only *is based on an erroneous statement of fact but also upon mere inference.*

For the purpose of demonstrating to this Honorable Court that the ballots, ballot boxes and election paraphernalia had been tampered with between the time of the election and the time they were introduced in evidence, we call the court's attention to page 60 of the Transcript of Evidence, wherein Mrs. Ruby Middleton, custodian of the boxes, testified:

"112. And that office is open to the public?

A. Yes, sir.

113. Practically all day? And isn't it a fact that all people having any business to do with ref-

erence to deeds or any business to transact with the County Clerk, had to come into that room where these boxes were stacked during those weeks?

A. Yes, sir, people coming and going.

115. And your clerks work there?

A. Yes, sir.

118. Those boxes were moved to the basement?

A. Well, you would not exactly say the basement; under the stairway leading to the basement.

119. And the key to that entrance to the basement was turned over to K. Bailey, was it not?

A. I turned it over to him. He is the janitor of the building. I didn't have it.

121. Didn't the janitor have a lock put on?

A. Not to my knowledge. The County Court ordered a lock to go on it, the best I recall, when they fixed the room for me. They took my storage space in the basement and they gave me that and naturally they put a lock on, the best I recall.

122. Who moved the box from the county clerk's office to this room underneath the steps?

A. It is hard to find help, but with the assistance of the janitor we picked up folks.

125. You never had a key to that basement, did you?

A. No, sir, as I said, it was to the stairway.

128. From your observation of those boxes were they in a different condition from that in which they were when they had been moved from your office and put in the basement.

A. *Well, I don't know where it happened, but some of them were different. I don't know when it happened but some of them were different.*"

We, therefore, earnestly maintain that under the authority of:

Lewis v. *Hensley,* 238 Ky. 18, 36 S. W. (2d) 840,
Rich v. *Young,* 176 Ky. 813, 197 S. W. 442,
Thompson v. *Stone,* 164 Ky. 18, 174 S. W. 763,

these ballots and ballot boxes could not be introduced in a civil suit and it, therefore, follows that if the rules of evidence in civil cases are to be applied in criminal cases, this evidence should not have been accepted by the court or permitted to go to the jury, and a reading of the record and of the opinion of the Circuit Court of Appeals will lead this court to the conclusion that had the safeguards been thrown around the petitioners that should have been given them, there would have been nothing to submit to the jury in the lower court.

CONCLUSION.

The decision of the Circuit Court of Appeals involves the construction of Federal rules and decisions of this court, and is so erroneous as to constitute a departure from the usual and accepted course of judicial procedure and calls for an exercise of this court's power of supervision. The question is of great importance and will be far-reaching in that, to our knowledge, it has never been passed upon by this court. The petition should be granted.

Respectfully submitted,

HARRY B. MILLER,
Lexington, Kentucky,
JAMES SAMPSON,
Harlan, Kentucky,
Counsel for Petitioners.